BATANG KALI ESTATES SDN. BHD.

v.

ROMANI BINTI ABDUL AZIZ

HIGH COURT MALAYA, KUALA LUMPUR
DATO' K.C. VOHRAH J
[CIVIL APPEAL NO. 12-25-92]
17 JULY 1995

TORT: *Road accident - Dependency claim under s. 7 Civil Law Act 1956 - Plaintiff claiming that rubber tree belonging to defendant company fell on the deceased - No witnesses to the accident - Onus of proof on plaintiff - Plaintiff alleging negligence against defendant - Whether plaintiff required to prove that the tree was diseased - Magistrate finding defendant wholly liable for accident - Appeal against decision.*

TORT: *Road accident - Plaintiff claiming that rubber tree belonging to defendant fell on the deceased - Plaintiff alleging nuisance against defendant - Whether proved - Whether plaintiff had proved that the tree was diseased - Whether plaintiff had shown that the defendant adopted the nuisance.*

The plaintiff's husband died in an accident and she sued the defendant company for damages in a dependency claim under s. 7 of the Civil Law Act 1956. The plaintiff's case was that a rubber tree belonging to the defendant company fell on the deceased, or alternatively that the deceased was caused to collide into the said tree which had fallen onto the road and thereby obstructed the lawful and proper path of the deceased. In the alternative the plaintiff alleged nuisance against the defendant.

At the conclusion of the trial, the learned Magistrate held the defendant company to be wholly liable for the accident and the defendant company appealed.

Held:

[1] The onus of proof is always on the plaintiff to show how the accident took place. Although the learned Magistrate was quite correct to observe that nobody saw the accident, she did not consider the available evidence that although the tree obstructed the road, it did not wholly do so as there was a gap of some 4 to 5 feet which the deceased could have passed through.

[2] Even assuming that the tree fell on the deceased, before negligence attaches to the defendant company, it has to be proved that the tree was diseased. The assistant manager of the defendant company categorically denied that the tree was diseased and his evidence of a thunderstorm on the night of the accident was borne out by the investigating officer who testified that before he went to the scene there had been heavy rain and wind and that the tree probably fell because of the strong wind. In the circumstances the Magistrate was left with no evidence whatsoever that the tree was diseased and that it fell because it was diseased.

[3] On the plaintiff's contention that there was a common law duty to inspect the trees and a failure to inspect is negligence, it has to be established that the tree that fell was diseased or that it had some other defect, and having established that, only then would the question whether the defendant company had taken steps to inspect the trees in the estate and remove the ones found to be dangerous arise.

[4] The plaintiff's claim of nuisance must also fail as there was absence of proof that the tree was in a decayed state as claimed in the pleading. In the circumstances the issue of it posing a danger because of its diseased state and the issue of knowledge of its diseased state does not arise.

[5] On the allegation that the defendant continuously allowed the fallen tree to remain on the said road and that it thereby constituted a potential danger to persons using the road, the evidence adduced showed that a storm had taken place just before the accident and the defendant had taken steps to clear the road on being informed that a tree had fallen. In the circumstances, the tort of nuisance was not made out in respect of the obstruction caused by the tree.

[Defendant company's appeal allowed with costs].

Cases referred to:
Cunliffe v. Banks [1945] 1 All ER 459 ***(refd)***
Thean Chew v. The Seaport (Selangor) Rubber Estate Ltd. [1960] MLJ 166 ***(foll)***
Len Omnibus Co. Ltd. Bhd. v. North South Transport Sdn. Bhd. & Sons [1979] 2 MLJ 246 ***(refd)***
Henderson v. Henry E Jenkins [1969] 1 All ER 401 ***(dist)***
Noble v. Harrison [1926] 2 KB 332 ***(refd)***
Rylands v. Fletcher [1868] LR 3 HL 330 ***(cit)***

Legislation referred to:
Civil Law Act, s. 7

For the appellant - J K Yeong; M/s. Lim Kean Siew & Co.
For the respondent - R K Nathan; M/s. R K Nathan & Co.

JUDGMENT

K.C. Vohrah J:

The plaintiff's husband died in an accident and she sued the defendant company for damages in a dependency claim under s. 7 of the Civil Law Act.

The defendant company has a rubber estate along the Ulu Yam Bharu - Batang Kali Road.

There was found at the accident scene near the second milestone along the Ulu Yam Bharu - Batang Kali Road, on the night of 30 August 1985, a motor cycle lying on the right hand side of the road as one faces Batang Kali. The rider of the motor cycle was the plaintiff's husband who had crash fractures of the second to the eight right ribs. The man died of haemorrhagic shock on the same day.

The plaintiff's case was that a rubber tree belonging to the defendant company "fell on the deceased, or alternatively, the deceased was caused to collide into the said tree which had fallen onto the said road thereof and thereby obstructed the lawful and proper path of the deceased ..."

In para. 4 of the plaintiff's statement of claim it is alleged that the accident was caused solely by the negligence of the defendant and/or its servants or agents in the supervision and maintenance of the rubber tree.

In para. 5 of the statement of claim nuisance is alleged.

Nobody, however, saw how the deceased came to be injured although there is no dispute that he was travelling on that road towards Ulu Yam Bharu. The police Sergeant (SP2) who went to the scene that night at about 8 p.m. said that he saw that a tree on the left side of the road (as one faces Batang Kali) had fallen across the road. He said that the branches

lying in the centre of the road had been cut and pushed aside to the right. The sketch plan (see D2) which he drew showed that a tree was lying from beyond the left side of the left sidetable of the road across the sidetable with part of the crown of the tree protruding slightly over to the right side of the road. His evidence showed that the roots of the tree were about 5 to 6 feet away from the inner edge of the left sidetable. The sketch plan showed a greater part of the left side and all of the right side of the road to be free from obstruction. The motor cycle was shown to be on the right sidetable some distance below the level of the fallen tree.

It has to be noted that the Sergeant went to the scene at about 8 pm and that the assistant manager (SD1) of the defendant company was there earlier (at about 7.30 pm) after he had been informed at 7 pm that a tree had fallen. And SD1 had instructed his men to clear up the road. He said that the tree (meaning, in the context of what he described in relation to the tree, the trunk of the tree) itself did not fall across the road, only that the branches fell on the road and this would appear to be borne out by the sketch plan (D2) which shows part of the trunk of the tree lying on the left sidetable and what appears to be branches from the trunk on the sidetable outspreading over the right edge of the sidetable onto the road. He also said, and this was not challenged, that 4 to 5 feet of the road (about 17' 2" wide) was not obstructed, meaning that about half of the right side of the road was not obstructed and that the deceased could have passed through the gap.

What also has to be noted is that both SP2 and SD1 were of the view that the tree fell because of a storm.

Thus, on the evidence adduced, it was quite correct for the Magistrate to observe that nobody saw the accident. She also said that it is not known whether the deceased was crushed by the tree while he was riding along that place or that he had collided into the fallen tree. She, however, did not consider the available evidence that although the tree obstructed the road it did not wholly do so as there was a gap of some 4 to 5 feet (more than half of the deceased's side of the road) which the deceased could have passed through assuming he was not crushed by the tree falling on him or he had not collided into it. The point is that the onus of proof is always on the plaintiff to show how the accident took place. The doctor who drew the postmortem examination report, could have thrown light from the nature of the crush injuries suffered by the deceased as to how the accident had occurred if he had been called to give evidence.

However, even assuming that the tree was the cause of the accident, was the defendant company negligent as claimed by the plaintiff? In the first place it has to be proved that the tree was diseased. The assistant manager of the defendant company (SD1) categorically denied that the tree was diseased - he testified that there was a thunderstorm that evening, that it was raining heavily and that the tree fell because of heavy wind. His evidence of the thunderstorm was borne out by the investigating officer who testified that before he went to the scene there had been heavy rain and wind and that the tree probably fell because of the strong wind.

In this case the Magistrate was left with no evidence whatsoever that the tree was diseased and that it fell because it was diseased. The plaintiff failed to produce any such evidence unlike the plaintiff in the case of *Cunliffe v. Banks* [1945] 1 All ER 459 (see 460 to 462 where detailed evidence of the diseased state of a fallen tree was reviewed) and unlike in *Thean Chew v. The Seaport (Selangor) Rubber Estate Ltd.* [1960] MLJ 166 (see 166 to 167 where again detailed evidence relating to the diseased state of a fallen tree was examined).

Inspite of there being no evidence of the tree being diseased the learned Magistrate held the defendant company to be wholly liable and she gave 3 reasons for coming to that view. The first reason she gave was that the defendant (meaning SD1) had admitted that he did not comply with the conditions relating to the planting of trees by the side of the road imposed by the Government. Were there such conditions? There was no evidence of such conditions. Obviously the Magistrate took into account an irrelevant matter when determining liability.

The second reason she advanced was that the defendant had never inspected the trees to see if they were diseased or not and that the defendant was not aware of the types of diseases trees were subjected to and that SD1 did not at all have any knowledge of the regulations relating to the planting of trees and of the types of diseases of trees. She concluded that this clearly showed the defendant company's negligence. She wholly missed the point that there was no evidence that the tree was diseased. Again the matters she addressed herself on are completely irrelevant to the issue of liability as I will discuss shortly in relation to the submission of the Counsel for the defendant - appellant.

The third reason the learned Magistrate gave was that SD1 had denied that the tree had fallen and that he had stated that the branches had fallen and that the evidence of SP2 contradicted the evidence of SD1 and that SD1 did also state that the tree blocked the road. If she meant that SD1 was not a reliable witness that still did not answer the question whether the tree had fallen because it was diseased and again an irrelevant matter was considered on the issue of liability.

In the submission before me Counsel for the defendant - appellant company was clearly right in attacking the Magistrate's reliance on the irrelevant considerations that I had mentioned earlier. Her submission was to the effect that the Magistrate had to consider **firstly** whether disease was the cause of the falling tree and **secondly**, if disease was the cause, whether the fall may be attributed to the negligence of the defendant company or it servants. She relied on *Thean Chew v. The Seaport (Selangor) Rubber Estate Ltd.* [1960] MLJ 166.

As was succinctly put by H.T. Ong J (as he then was) at 168 in that case in regard to the second consideration, where, as pointed out earlier, there was detailed evidence that the fallen rubber tree was diseased,

> The issue appears to be this. When a rubber tree stands so close to the highway that its fall would endanger persons passing along the highway, and the manager knows or ought to know, that if it is infected with a disease that rots any part of the root system or bole affected by it, has he taken all necessary precautions to prevent danger to passers-by on the highway as would be taken by a reasonable and prudent landowner by merely keeping the tree under frequent regular observation.

The point of this passage is that it has to be proved that the tree was infected by disease and then only would the issue of the negligence of the defendant be considered. In our case there was absolutely no evidence either through the plaintiff's or the defendant company's witnesses that the tree was diseased and that it fell because of the disease.

Counsel for the plaintiff - respondent argued that there was a common law duty to inspect the trees and a failure to inspect is negligence citing para. 4 of the headnote in *Len Omnibus Co. Ltd. Bhd. v. North South Transport Sdn. Bhd. & Sons* [1979] 2 MLJ 246. Paragraph 4 of the headnote is a synopsis of what Raja Azlan Shah Ag. CJ (as His Highness then was) stated in the Federal Court (at 248) and has to be understood in its proper context. First, this passage (at 248) sets the context:

> [The trial Judge] came to the conclusion that the third party had kept a reasonable look out and had taken reasonable steps to look for signs or symptoms of root disease. **He found as a fact that the particular tree was not suffering from any root disease.** (Emphasis mine)

Raja Azlan Shah Ag. CJ then went on to state that the defendants did not press the issue of the negligence beyond complaining that the learned Judges finding that the third party as owners of the fallen tree was not supported by the evidence and added:

> In my opinion the learned Judge had correctly applied the law to the facts of the present case. It is well established that the duty of the appellants as an estate owner was to take such steps as a reasonable and prudent landowner would take, and the question was one of fact whether their conduct infringed this requirement. This was the test adopted by Lords Normand and Reid in *Caminer v. Northern & London Investment Trust, Limited* [1951] AC 88 and which was applied in the local case of *Thean Chew v. The Seaport (Selangor) Rubber Estate Ltd.* [1960] MLJ 166. The test postulates not expert knowledge on their part but some degree of knowledge as reasonable and prudent landowner would possess. Accordingly, an estate owner who has rubber trees growing on his estate adjoining the highway is not expected to possess scientific knowledge of diseases that may affect the trees but he is expected as a reasonable and prudent landowner to inspect the trees from time to time to assess their safety and if there is a danger of one of those trees falling on the highway, and possibly injuring someone who is using the highway, it is his duty to have that tree removed which is found to be dangerous.

Clearly therefore in the context of this case, it has to be established that the tree that fell was diseased or that it had some other defect and having established that, then only, the question whether the defendant company had taken steps to inspect the trees in the estate and removing the tree found to be dangerous would arise.

Counsel for the plaintiff - respondent also strongly relied on *Henderson v. Henry E Jenkins* [1969] 1 All ER 401 to say that negligence was established as there was a failure to inspect the trees. With respect the case dealt with a latent defect in a hydraulic breaking system of a lorry that was involved in an accident and the Court of Appeal held that if a defendant seeks to rely on a latent defect as the sole cause of the accident, it is incumbent on him to establish that he exercised due care and had in force a proper system of maintenance. That does not arise in the instant case. The defendant company in its defence did not admit that the tree was diseased.

Moving away from the tort of negligence to the tort of nuisance, the plaintiff claimed that (see p. 5 of the statement of claim) that the defendant or its servants or agents "continuously allowed the said rubber tree to remain in a decayed condition near to the road and/or alternately permitted the fallen rubber tree to be planted too close to the road and thereby failed to anticipate that if there was a heavy rainfall or thunderstorm as has been alleged, the proximity of the trees to the road was a potential forseeable danger and/or in the alternative continuously allowing the fallen tree to remain on the said road and had thereby constituted a potential danger to persons lawfully using the same. By reason of the matters aforesaid, the defendants caused or alternatively adopted the said nuisance." Here again we come back to the absence of proof that the tree was in a decayed state as claimed in the pleading. The issue of it posing a danger because of its diseased state and the issue of knowledge of its diseased state do not arise, and I think in this context it is apposite to refer to *Noble v. Harrison* [1926] 2 KB 332. In that case (see the headnote), a branch of a beech tree growing on the defendant's land overhung a highway at a height of 30 feet above the ground. In fine weather the branch suddenly broke, fell upon the plaintiff's vehicle, which was passing along the highway, and damaged it. In an action by the plaintiff claiming in respect of the damage to his vehicle, the County Court Judge found that neither the defendant

nor his servants knew that the branch was dangerous, and that the fracture was due to a latent defect not discoverable by any reasonably careful inspection, but he held that the defendant was liable (1.) upon the principle of *Rylands v. Fletcher* [1868] LR 3 HL 330, and (2.) as for a nuisance. Rowlatt and Wright JJ held, reversing the decision of the County Court Judge (1.) that the *Rylands v. Flectcher* principle had no application, inasmuch as a tree was not in itself a dangerous thing, and to grow trees was one of the natural uses of the soil; and (2.) that the mere fact that the branch overhung the highway did not make it a nuisance, seeing that it did not obstruct the free passage of the highway, and although the branch proved to be a danger the defendant was not liable, inasmuch as he had not created the danger and had no knowledge, actual or imputed, of its existence.

Just one other matter in regard to para. 5 of the statement of claim as far as the claim of nuisance is concerned. There is the allegation that the defendant continuously allowed the fallen tree to remain on the said road and that it thereby constituted a potential danger to persons using the road. As was adverted to earlier the assistant manager (SD1) of the rubber estate of the defendant was at the accident scene at about 7.30 pm after he had been informed half an hour earlier that a tree had fallen and he took steps to clear the road. The evidence would tend to show that the storm had taken place just before the accident and I cannot see the tort of nuisance being made out in respect of the obstruction caused by the tree. It is illuminating to refer to what Raja Azlan Shah Ag CJ stated in *Len Omnibus Co. Ltd. Bhd. v. North South Transport Sdn. Bhd.* (at 249).

> That is a proposition which I refuse to accept. If a tree adjoining a highway falls on the road without any negligence on the part of its owner, and the said tree causes an obstruction to the said highway, it is wrong to suppose that *ipso facto* and immediately a nuisance is created. The keynote of his responsibility is knowledge or means of knowledge. Thus, a nuisance will obviously be created if, knowing or having the means of knowing of its existence, he allows it to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that an obstruction has come into existence cannot overnight turn it into a nuisance. Each case must be examined whether or not a nuisance is created. If that were not so, it would seem that every landowner who owns trees adjoining a highway would be turned into an insurer. That in my opinion would run contrary to the recognised law on the question of nuisance to highways.

In all the circumstances my view was that the Magistrate was wrong in finding the defendant company liable and I allowed the appeal of the defendant's company with costs.